SUPREME COURT OF THE UNITED STATES

No. 97-371

NATIONAL ENDOWMENT FOR THE ARTS, ET AL., PETITIONERS v. KAREN FINLEY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 25, 1998]

JUSTICE SOUTER, dissenting.

The question here is whether the italicized segment of this statute is unconstitutional on its face: "artistic excellence and artistic merit are the criteria by which applications [for grants from the National Endowment for the Arts] are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U. S. C. §954(d) (emphasis added). It is.

The decency and respect proviso mandates viewpoint-based decisions in the disbursement of government subsidies, and the Government has wholly failed to explain why the statute should be afforded an exemption from the fundamental rule of the First Amendment that viewpoint discrimination in the exercise of public authority over expressive activity is unconstitutional. The Court's conclusions that the proviso is not viewpoint based, that it is not a regulation, and that the NEA may permissibly engage in viewpoint-based discrimination, are all patently mistaken. Nor may the question raised be answered in the Government's favor on the assumption that some constitutional applications of the statute are enough to satisfy the demand of facial constitutionality, leaving claims of the proviso's obvious invalidity to be dealt with later in

response to challenges of specific applications of the discriminatory standards. This assumption is irreconcilable with our long standing and sensible doctrine of facial overbreadth, applicable to claims brought under the First Amendment's speech clause. I respectfully dissent.

I

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas," Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972), which is to say that "[t]he principle of viewpoint neutrality ... underlies the First Amendment," Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 505 (1984). Because this principle applies not only to affirmative suppression of speech, but also to disqualification for government favors, Congress is generally not permitted to pivot discrimination against otherwise protected speech on the offensiveness or unacceptability of the views it expresses. See, e.g., Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) (public university's student activities funds may not be disbursed on viewpoint-based terms); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) (after-hours access to public school property may not be withheld on the basis of viewpoint); Leathers v. Medlock, 499 U. S. 439, 447 (1991) ("[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints"); Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1 (1986) (government-mandated access to public utility's billing envelopes must not be viewpoint based); Members of City

Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others").

It goes without saying that artistic expression lies within this First Amendment protection. See, e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 569 (1995) (remarking that examples of painting, music, and poetry are "unquestionably shielded"); Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment"); Schad v. Mount Ephraim, 452 U. S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee"); Kaplan v. California, 413 U. S. 115, 119–120 (1973) ("[P]ictures, films, paintings, drawings, and engravings ... have First Amendment protection"). constitutional protection of artistic works turns not on the political significance that may be attributable to such productions, though they may indeed comment on the political,1 but simply on their expressive character, which falls within a spectrum of protected "speech" extending outward from the core of overtly political declarations. Put differently, art is entitled to full protection because our "cultural life," just like our native politics, "rests upon [the] ideal" of governmental viewpoint neutrality. Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 641 (1994).

¹ Art "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression." *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 501 (1952).

SOUTER, J., dissenting

When called upon to vindicate this ideal, we characteristically begin by asking "whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration." Ward v. Rock Against Racism, supra, at 791 (citation omitted). The answer in this case is damning. One need do nothing more than read the text of the statute to conclude that Congress's purpose in imposing the decency and respect criteria was to prevent the funding of art that conveys an offensive message; the decency and respect provision on its face is quintessentially viewpoint based, and quotations from the Congressional Record merely confirm the obvious legislative purpose. In the words of a cosponsor of the bill that enacted the proviso, "[w]orks which deeply offend the sensibilities of significant portions of the public ought not to be supported with public funds." 136 Cong. Rec. 28624 (1990).2 Another supporter of the bill observed that "the Endowment's support for artists like Robert Mapplethorpe and Andre[s] Serrano has offended and angered many citizens," behooving "Congress . . . to listen to these complaints about the NEA and make sure that exhibits like [these] are not funded again." Id., at 28642. Indeed, if there were any question at all about what Congress had in mind, a definitive answer comes in the succinctly accurate remark of the proviso's author, that the bill "add[s] to the criteria of artistic excellence and artistic merit, a shell, a screen, a viewpoint that must be constantly taken into

² There is, of course, nothing whatsoever unconstitutional about this view as a general matter. Congress has no obligation to support artistic enterprises that many people detest. The First Amendment speaks up only when Congress decides to participate in the Nation's artistic life by legal regulation, as it does through a subsidy scheme like the NEA. If Congress does choose to spend public funds in this manner, it may not discriminate by viewpoint in deciding who gets the money.

account." Id., at 28631.3

II

In the face of such clear legislative purpose, so plainly expressed, the Court has its work cut out for it in seeking a constitutional reading of the statute. See *Edward J.*

³On the subject of legislative history and purpose, it is disturbing that the Court upholds §954(d) in part because the statute was drafted in hope of avoiding constitutional objections, with some Members of Congress proclaiming its constitutionality on the congressional floor. See ante, at 10-11. Like the Court, I assume that many Members of Congress believed the bill to be constitutional. Indeed, Members of Congress must take an oath or affirmation to support the Constitution, see U. S. Const., Art. VI, cl. 3, and we should presume in every case that Congress believed its statute to be consistent with the constitutional commands, see, e.g., United States v. X-Citement Video, Inc., 513 U. S. 64, 73 (1994) ("[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution"); Yates v. United States, 354 U.S. 298, 319 (1957). But courts cannot allow a legislature's conclusory belief in constitutionality, however sincere, to trump incontrovertible unconstitutionality, for "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 1 Cranch 137, 177 (1803).

I recognize, as the Court explains, ante, at 10, that the amendment adding the decency and respect proviso was a bipartisan counterweight to more severe alternatives, and that some Members of Congress may have voted for it simply because it seemed the least among various evils. See, e.g., 136 Cong. Rec. 28670 (1990) ("I am not happy with all aspects of the Williams-Coleman substitute It . . . contains language concerning standards of decency that I find very troubling. But I applaud Mr. WILLIAMS for his efforts in achieving this compromise under very difficult circumstances I support the Williams-Coleman substitute"). Perhaps the proviso was the mildest alternative available, but that simply proves that the bipartisan push to reauthorize the NEA could succeed only by including at least some viewpoint-based limitations. An appreciation of alternatives does not alter the fact that Congress passed decency and respect restrictions, and it did so knowing and intending that those restrictions would prevent future controversies stemming from the NEA's funding of inflammatory art projects, by declaring the inflammatory to be disfavored for funding.

SOUTER, J., dissenting

DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U. S. 568, 575 (1988).

Α

The Court says, first, that because the phrase "general standards of decency and respect for the diverse beliefs and values of the American public" is imprecise and capable of multiple interpretations, "the considerations that the provision introduces, by their nature, do not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face." *Ante*, at 12. Unquestioned case law, however, is clearly to the contrary.

"Sexual expression which is indecent but not obscene is protected by the First Amendment," Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989), and except when protecting children from exposure to indecent material, see FCC v. Pacifica Foundation, 438 U.S. 726 (1978), the First Amendment has never been read to allow the government to rove around imposing general standards of decency, see, e.g., Reno v. American Civil Liberties Union, 521 U.S. (1997) (striking down on its face a statute that regulated "indecency" on the Internet). Because "the normal definition of 'indecent' . . . refers to nonconformance with accepted standards of morality," FCC v. Pacifica Foundation, supra, at 740, restrictions turning on decency, especially those couched in terms of "general standards of decency," are quintessentially viewpoint based: they require discrimination on the basis of conformity with mainstream mores. The Government's contrary suggestion that the NEA's decency standards restrict only the "mode, form, or style" of artistic expression, not the underlying viewpoint or message, Brief for Petitioners 39-41, may be a tempting abstraction (and one not lacking in support, cf. Bolger v. Youngs Drug Products Corp., 463 U. S. 60, 83-84 (1983) (STEVENS, J., concurring in judg-

ment)). But here it suffices to realize that "mode, form, or style" are not subject to abstraction from artistic viewpoint, and to quote from an opinion just two years old: "In artistic . . . settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying otherwise inexpressible emotions. . . . Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power." Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 805 (1996) (KENNEDY, J., joined by GINSBURG, J., concurring) (citation and internal quotation marks omitted); see also Cohen v. California, 403 U. S. 15, 26 (1971) ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process"). "[T]he inextricability of indecency from expression," Denver Area Ed. Telecommunications Consortium, supra, at 805, is beyond dispute in a certain amount of entirely lawful artistic enterprise. Starve the mode, starve the message.

Just as self-evidently, a statute disfavoring speech that fails to respect America's "diverse beliefs and values" is the very model of viewpoint discrimination; it penalizes any view disrespectful to any belief or value espoused by someone in the American populace. Boiled down to its practical essence, the limitation obviously means that art that disrespects the ideology, opinions, or convictions of a significant segment of the American public is to be disfavored, whereas art that reinforces those values is not. After all, the whole point of the proviso was to make sure that works like Serrano's ostensibly blasphemous portrayal of Jesus would not be funded, see *supra*, at 4, while a reverent treatment, conventionally respectful of Christian sensibilities, would not run afoul of the law. Nothing could be more viewpoint based than that. Cf. Rosenberger, 515 U. S., at 831 (a statute targeting a "prohibited per-

SOUTER, J., dissenting

spective, not the general subject matter" of religion is viewpoint based); *United States* v. *Eichman*, 496 U. S. 310, 317 (1990) (striking down anti-flag-burning statute because it impermissibly prohibited speech that was "disrespectful" of the flag). The fact that the statute disfavors art insufficiently respectful of America's "diverse" beliefs and values alters this conclusion not one whit: the First Amendment does not validate the ambition to disqualify many disrespectful viewpoints instead of merely one. See *Rosenberger*, *supra*, at 831–832.

В

Another alternative for avoiding unconstitutionality that the Court appears to regard with some favor is the Government's argument that the NEA may comply with §954(d) merely by populating the advisory panels that analyze grant applications with members of diverse backgrounds. See *ante*, at 5–6, 10. Would that it were so easy; this asserted implementation of the law fails even to "reflec[t] a plausible construction of the plain language of the statute." *Rust* v. *Sullivan*, 500 U. S. 173, 184 (1991).

The Government notes that §954(d) actually provides that "[i]n establishing . . . regulations and procedures, the Chairperson [of the NEA] shall ensure that (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." According to the Government, this language requires decency and respect to be considered not in judging applications, but in making regulations. If, then, the Chairperson takes decency and respect into consideration through regulations ensuring diverse panels, the statute is satisfied. But it would take a great act of will to find any plausibility in this reading. The reference to considering decency and respect occurs in the subparagraph speaking to the "criteria by which appli-

cations are judged," not in the preamble directing the Chairperson to adopt regulations; it is in judging applications that decency and respect are most obviously to be considered. It is no surprise, then, that the Government's reading is directly contradicted by the legislative history. According to the provision's author, the decency and respect proviso "mandates that in the awarding of funds, in the award process itself, general standards of decency must be accorded." 136 Cong. Rec. 28672 (1990). Or, as the cosponsor of the bill put it, "the decisions of artistic excellence must take into consideration general standards of decency and respect for the diverse beliefs and values of the American public." *Id.*, at 28624.

The Government offers a variant of this argument in suggesting that even if the NEA must take decency and respect into account in the active review of applications, it may satisfy the statute by doing so in an indirect way through the natural behavior of diversely constituted panels. This, indeed, has apparently been the position of the Chairperson of the NEA since shortly after the legislation was first passed. But the problems with this position are obvious. First, it defies the statute's plain language to suggest that the NEA complies with the law merely by allowing decency and respect to have their way through the subconscious inclinations of panel members. "[T]aking into consideration" is a conscious activity. See Webster's New International Dictionary 2570 (2d ed. 1949) (defining "take into consideration" as "[t]o make allowance in judging for"); id., at 569 (defining "consideration" as the "[a]ct or process of considering; continuous and careful thought; examination; deliberation; attention"); id., at 568 (defining "consider" as "to think on with care . . . to bear in mind"). Second, even assuming that diverse panel composition would produce a sufficient response to the proviso, that would merely mean that selection for decency and respect would occur derivatively through the inclinations of the

panel members, instead of directly through the intentional application of the criteria; at the end of the day, the proviso would still serve its purpose to screen out offending artistic works, and it would still be unconstitutional. Finally, a less obvious but equally dispositive response is that reading the statute as a mandate that may be satisfied merely by selecting diverse panels renders §954(d)(1) essentially redundant of §959(c), which provides that the review panels must comprise "individuals reflecting a wide geographic, ethnic, and minority representation as well as individuals reflecting diverse artistic and cultural points of view." Statutory interpretations that "render superfluous other provisions in the same enactment" are strongly disfavored. *Freytag* v. *Commissioner*, 501 U. S. 868, 877 (1991) (internal quotation marks omitted).

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A third try at avoiding constitutional problems is the Court's disclaimer of any constitutional issue here because "[s]ection 954(d)(1) adds 'considerations' to the grant-making process; it does not preclude awards to projects that might be deemed 'indecent' or 'disrespectful,' nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application." *Ante*, at 9–10. Since "§954(d)(1) admonishes the NEA merely to take 'decency and respect' into consideration," *ante*, at 11, not to make funding decisions specifically on those grounds, the Court sees no constitutional difficulty.

That is not a fair reading. Just as the statute cannot be read as anything but viewpoint based, or as requiring nothing more than diverse review panels, it cannot be read as tolerating awards to spread indecency or disrespect, so long as the review panel, the National Counsel on the Arts, and the Chairperson have given some thought to the offending qualities and decided to underwrite them any-

way. That, after all, is presumably just what prompted the congressional outrage in the first place, and there was nothing naive about the Representative who said he voted for the bill because it does "not tolerate wasting Federal funds for sexually explicit photographs [or] sacrilegious works." 136 Cong. Rec. 28676 (1990).

But even if I found the Court's view of "consideration" plausible, that would make no difference at all on the question of constitutionality. What if the statute required a panel to apply criteria "taking into consideration the centrality of Christianity to the American cultural experience," or "taking into consideration whether the artist is a communist," or "taking into consideration the political message conveyed by the art," or even "taking into consideration the superiority of the white race"? Would the Court hold these considerations facially constitutional, merely because the statute had no requirement to give them any particular, much less controlling, weight? assume not. In such instances, the Court would hold that the First Amendment bars the government from considering viewpoint when it decides whether to subsidize private speech, and a statute that mandates the consideration of viewpoint is quite obviously unconstitutional. Cf. Dawson v. Delaware, 503 U. S. 159, 167 (1992) (holding that the First Amendment forbids reliance on a defendant's abstract beliefs at sentencing, even if they are considered as one factor among many); Ozonoff v. Berzak, 744 F. 2d 224, 233 (CA1 1984) (Breyer, J.) (holding that an Executive Order which provided that a person's political associations "may be considered" in determining security clearance violated the First Amendment). Section 954(d)(1) is just such a statute.

Ш

A second basic strand in the Court's treatment of today's question, see *ante*, at 14–17, and the heart of JUSTICE

SOUTER, J., dissenting

SCALIA's, see *ante*, at 6–10, in effect assumes that whether or not the statute mandates viewpoint discrimination, there is no constitutional issue here because government art subsidies fall within a zone of activity free from First Amendment restraints. The Government calls attention to the roles of government-as-speaker and government-as-buyer, in which the government is of course entitled to engage in viewpoint discrimination: if the Food and Drug Administration launches an advertising campaign on the subject of smoking, it may condemn the habit without also having to show a cowboy taking a puff on the opposite page;⁴ and if the Secretary of Defense wishes to buy a portrait to decorate the Pentagon, he is free to prefer George Washington over George the Third.⁵

The Government freely admits, however, that it neither speaks through the expression subsidized by the NEA,⁶ nor buys anything for itself with its NEA grants. On the contrary, believing that "[t]he arts . . . reflect the high place accorded by the American people to the nation's rich cultural heritage," §951(6), and that "[i]t is vital to a de-

⁴ See *Rust* v. *Sullivan*, 500 U. S. 173, 194 (1991) ("When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U. S. C. §4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism").

⁵ On proposing the Public Works Art Project (PWAP), the New Deal program that hired artists to decorate public buildings, President Roosevelt allegedly remarked: "I can't have a lot of young enthusiasts painting Lenin's head on the Justice Building." Quoted in Mankin, Federal Arts Patronage in the New Deal, in America's Commitment to Culture: Government and the Arts 77 (K. Mulcahy & M. Wyszomirski eds. 1995). He was buying, and was free to take his choice.

⁶Here, the "communicative element inherent in the very act of funding itself," *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 892–893, n. 11 (1995) (SOUTER, J., dissenting), is an endorsement of the importance of the arts collectively, not an endorsement of the individual message espoused in a given work of art.

mocracy . . . to provide financial assistance to its artists and the organizations that support their work," §951(10), the Government acts as a patron, financially underwriting the production of art by private artists and impresarios for independent consumption. Accordingly, the Government would have us liberate government-as-patron from First Amendment strictures not by placing it squarely within the categories of government-as-buyer or government-as-speaker, but by recognizing a new category by analogy to those accepted ones. The analogy is, however, a very poor fit, and this patronage falls embarrassingly on the wrong side of the line between government-as-buyer or -speaker and government-as-regulator-of-private-speech.

The division is reflected quite clearly in our precedents. Drawing on the notion of government-as-speaker, we held in Rust v. Sullivan, 500 U.S., at 194, that the Government was entitled to appropriate public funds for the promotion of particular choices among alternatives offered by health and social service providers (e.g., family planning with, and without, resort to abortion). When the government promotes a particular governmental program, "it is entitled to define the limits of that program," and to dictate the viewpoint expressed by speakers who are paid to participate in it. *Ibid.*⁷ But we added the important qualifying language that "[t]his is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression."

⁷In *Rust*, "the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger*, *supra*, at 833 (citing *Rust*, *supra*, at 194).

Id., at 199. Indeed, outside of the contexts of government-as-buyer and government-as-speaker, we have held time and time again that Congress may not "discriminate invidiously in its subsidies in such a way as to aim at the suppression of . . . ideas." Regan v. Taxation with Representation of Wash., 461 U. S. 540, 548 (1983) (internal quotation marks and brackets omitted); see also Lamb's Chapel, 508 U. S., at 394 (when the government subsidizes private speech, it may not "favor some viewpoints or ideas at the expense of others"); Hannegan v. Esquire, Inc., 327 U. S. 146, 149 (1946) (the Postmaster General may not deny subsidies to certain periodicals on the ground that they are "morally improper and not for the public welfare and the public good").

Our most thorough statement of these principles is found in the recent case of Rosenberger v. Rector and Visitors of Univ. of Va., 515 U. S. 819 (1995), which held that the University of Virginia could not discriminate on viewpoint in underwriting the speech of student-run publications. We recognized that the government may act on the basis of viewpoint "when the State is the speaker" or when the state "disburses public funds to private entities to convey a governmental message." Id., at 833. But we explained that the government may not act on viewpoint when it "does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." Id., at 834. When the government acts as patron, subsidizing the expression of others, it may not prefer one lawfully stated view over another.

Rosenberger controls here. The NEA, like the student activities fund in Rosenberger, is a subsidy scheme created to encourage expression of a diversity of views from private speakers. Congress brought the NEA into being to help all Americans "achieve a better understanding of the past, a better analysis of the present, and a better view of

the future." §951(3). The NEA's purpose is to "support new ideas" and "to help create and sustain . . . a climate encouraging freedom of thought, imagination, and inquiry." §§951(10),(7); see also S. Rep. No. 300, 89th Cong., 1st Sess., 4 (1965) ("[T]he intent of this act should be the encouragement of free inquiry and expression"); H. R. Rep. No. 99-274, p. 13 (1985) (committee report accompanying bill to reauthorize and amend the NEA's governing statute) ("As the Preamble of the act directs, the Endownment['s] programs should be open and richly diverse, reflecting the ferment of ideas which has always made this Nation strong and free"). Given this congressional choice to sustain freedom of expression, Rosenberger teaches that the First Amendment forbids decisions based on viewpoint popularity. So long as Congress chooses to subsidize expressive endeavors at large, it has no business requiring the NEA to turn down funding applications of artists and exhibitors who devote their "freedom of thought, imagination, and inquiry" to defying our tastes, our beliefs, or our values. It may not use the NEA's purse to "suppres[s] . . . dangerous ideas." Regan v. Taxation with Representation of Wash., supra, at 548 (internal quotation marks omitted).

The Court says otherwise, claiming to distinguish *Rosenberger* on the ground that the student activities funds in that case were generally available to most applicants, whereas NEA funds are disbursed selectively and competitively to a choice few. *Ante*, at 15. But the Court in *Rosenberger* anticipated and specifically rejected just this distinction when it held in no uncertain terms that "[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." 515 U. S., at 835.8 Scarce money demands choices, of

⁸The Court's attempt to avoid *Rosenberger* by describing NEA funding in terms of competition, not scarcity, will not work. Competition

course, but choices "on some acceptable [viewpoint] neutral principle," like artistic excellence and artistic merit;9 "nothing in our decision[s] indicate[s] that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible." Ibid.; see also Arkansas Ed. Television Comm'n v. Forbes, 523 U.S. _ (1998) (slip op., at 8-9) (scarcity of air time does not justify viewpoint-based exclusion of candidates from a debate on public television; neutral selection criteria must be employed). If the student activities fund at issue in Rosenberger had awarded competitive, merit-based grants to only 50%, or even 5%, of the applicants, on the basis of "journalistic merit taking into consideration the message of the newspaper," it is obvious beyond peradventure that the Court would not have come out differently, leaving the University free to refuse funding after considering a publication's Christian perspective. 10

implies scarcity, without which there is no exclusive prize to compete for; the Court's "competition" is merely a surrogate for "scarcity."

⁹While criteria of "artistic excellence and artistic merit" may raise intractable issues about the identification of artistic worth, and could no doubt be used covertly to filter out unwanted ideas, there is nothing inherently viewpoint discriminatory about such merit-based criteria. We have noted before that an esthetic government goal is perfectly legitimate. See Metromedia, Inc. v. San Diego, 453 U.S. 490, 507-508 (1981) (plurality opinion). Decency and respect, on the other hand, are inherently and facially viewpoint based, and serve no legitimate and permissible end. The Court's assertion that the mere fact that grants must be awarded according to artistic merit precludes "absolute neutrality" on the part of the NEA, ante, at 15, is therefore misdirected. It is not to the point that the government necessarily makes choices among competing applications, or even that its judgments about artistic quality may be branded as subjective to some greater or lesser degree; the question here is whether the government may apply patently viewpoint-based criteria in making those choices.

¹⁰JUSTICE SCALIA suggests that *Rosenberger* turned not on the distinction between government-as-speaker and government-as-facilitator-of-private-speech, but rather on the fact that "the government had estab-

A word should be said, finally, about a proposed alternative to this failed analogy. As the Solicitor General put it at oral argument, "there is something unique . . . about the Government funding of the arts for First Amendment purposes." Tr. of Oral Arg. 27. However different the governmental patron may be from the governmental speaker or buyer, the argument goes, patronage is also singularly different from traditional regulation of speech, and the limitations placed on the latter would be out of place when applied to viewpoint discrimination in distributing patronage. To this, there are two answers. The first, again, is Rosenberger, which forecloses any claim that the NEA and the First Amendment issues that arise under it are somehow unique. But even if we had no Rosenberger, and even if I thought the NEA's program of patronage was truly singular, I would not hesitate to reject the Government's plea to recognize a new, categorical patronage exemption from the requirement of viewpoint neutrality. I would reject it for the simple reason that the Government has offered nothing to justify recognition of a new exempt category.

The question of who has the burden to justify a categorical exemption has never been explicitly addressed by this

lished a limited public forum." *Ante*, at 10. Leaving aside the proper application of forum analysis to the NEA and its projects, I cannot agree that the holding of *Rosenberger* turned on characterizing its metaphorical forum as public in some degree. Like this case, *Rosenberger* involved viewpoint discrimination, and we have made it clear that such discrimination is impermissible in all forums, even non-public ones, *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 806 (1985), where, by definition, the government has not made public property generally available to facilitate private speech, *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 46 (1983) (defining a non-public forum as "[p]ublic property which is not by tradition or designation a forum for public communication"). Accordingly, *Rosenberger's* brief allusion to forum analysis was in no way determinative of the Court's holding.

Court, despite our recognition of the speaker and buyer categories in the past. The answer is nonetheless obvious in a recent statement by the Court synthesizing a host of cases on viewpoint discrimination. "The First Amendment presumptively places this sort of discrimination beyond the power of the government." Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd., 502 U. S. 105, 116 (1991). Because it takes something to defeat a presumption, the burden is necessarily on the Government to justify a new exception to the fundamental rules that give life to the First Amendment. It is up to the Government to explain why a sphere of governmental participation in the arts (unique or not) should be treated as outside traditional First Amendment limits. The Government has not carried this burden here, or even squarely faced it.

IV

Although I, like the Court, recognize that "facial challenges to legislation are generally disfavored," FW/PBS, Inc. v. Dallas, 493 U. S. 215, 223 (1990), the proviso is the type of statute that most obviously lends itself to such an attack. The NEA does not offer a list of reasons when it denies a grant application, and an artist or exhibitor whose subject raises a hint of controversy can never know for sure whether the decency and respect criteria played a part in any decision by the NEA to deny funding. Hence, the most that we could hope for in waiting for an asapplied challenge would be (a) a plaintiff whose rejected proposal raised some risk of offense and was not aimed at exhibition in a forum in which decency and respect might serve as permissible selection criteria, or (b) a plaintiff who sought funding for a project that had been sanitized to avoid rejection. But no one has denied here that the institutional plaintiff, the National Association of Artists' Organizations (NAAO), has representative standing on behalf of some such potential plaintiffs. See App. 21–25 (declaration of NAAO's Executive Director, listing exam-

ples of the potentially objectionable works produced by several member organizations). We would therefore gain nothing at all by dismissing this case and requiring those individuals or groups to bring essentially the same suit, restyled as an as-applied challenge raising one of the possibilities just mentioned.

In entertaining this challenge, the Court finds §954(d)(1) constitutional on its face in part because there are "a number of indisputably constitutional applications" for both the "decency" and the "respect" criteria, ante, at 13, and it is hard to imagine "how 'decency' or 'respect' would bear on grant applications in categories such as funding for symphony orchestras," ante, at 12. There are circumstances in which we have rejected facial challenges for similar reasons. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). quite apart from any question that might be raised about that statement as a general rule, 11 it is beyond question, as the Court freely concedes, that it can have no application here, it being well settled that the general rule does not limit challenges brought under the First Amendment's speech clause.

There is an "exception to th[e] [capable-of-constitutional-application] rule recognized in our jurisprudence [for] facial challenge[s] based upon First Amendment free-speech grounds. We have applied to statutes restricting speech a so-called 'overbreadth' doctrine, rendering such a statute

¹¹ Cf., e.g., Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833, 895 (1992) (statute restricting abortion will be struck down if, "in a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion").

invalid in all its applications (i.e., facially invalid) if it is invalid in any of them." Ada v. Guam Society of Obstetricians & Gynecologists, 506 U. S. 1011, 1012 (1992) (SCALIA, J., dissenting from denial of certiorari); ¹² see, e.g., Reno v. American Civil Liberties Union, 521 U.S. (1997) (striking down decency provision of Communications Decency Act as facially overbroad); id., at ___ (slip op., at 9-10) (O'CONNOR, J., concurring in judgment in part and dissenting in part) (declining to apply the rule of Salerno because the plaintiffs' claim arose under the First Amendment); Schad v. Mount Ephraim, 452 U.S., at 66 ("Because appellants' claims are rooted in the First Amendment, they are entitled to . . . raise an overbreadth challenge") (internal quotation marks omitted); Gooding v. Wilson, 405 U. S. 518, 521-522 (1972).13 Thus, we have routinely understood the overbreadth doctrine to apply where the plaintiff mounts a facial challenge to a law investing the government with discretion to discriminate on viewpoint when it parcels out benefits in support of speech. See, e.g., City of Lakewood v. Plain Dealer Publishing Co., 486 U. S. 750, 759 (1988) ("[A] facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers"); Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) (applying overbreadth doctrine to invalidate on its face an ordinance allowing for content-based discrimination in the awarding of parade

¹² We have, however, recognized that "the overbreadth doctrine does not apply to commercial speech." *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 497 (1982).

¹³ Cf. *United States* v. *Salerno*, 481 U. S. 739, 745 (1987) ("The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment").

permits).

To be sure, such a "facial challenge will not succeed unless the statute is 'substantially' overbroad," New York State Club Assn., Inc. v. City of New York, 487 U. S. 1, 11 (1988), by which we mean that "a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications," New York v. Ferber, 458 U. S. 747, 771 (1982). But that is no impediment to invalidation here. The Court speculates that the "decency" criterion might permissibly be applied to applications seeking to create or display art in schools¹⁴ or children's museums, whereas the "respect" criterion might permissibly be applied to applications seeking to create art that celebrates a minority, tribal, rural, or inner-city culture. But even so, this is certainly a case in which the challenged statute "reaches a substantial number of impermissible applications," not one in which the statute's "legitimate reach dwarfs its arguably impermissible applications." Id., at 771, 773. On the contrary, nothing in the record suggests that the grant scheme administered under the broad authorization of the NEA's governing statute, see §§951, 954(c), devotes an overwhelming proportion of its resources to schools and ethnic commemoration. Since the decency and respect criteria may not be employed in the very many instances in which the art seeking a sub-

¹⁴In placing such emphasis on the potential applicability of the decency criterion to educational programs, the Court neglects to point out the existence of §954a, entitled "[a]ccess to the arts through support of education," which is concerned specifically with funding for arts education, especially in elementary and secondary schools. It seems that the NEA's "mission" to promote arts education, *ante*, at 13, is carried out primarily through §954a, not §954. While the decency standard might be constitutionally permissible when applied to applications for grants under §954a, that standard does not appear to be relevant to such applications at all; the decency and respect provision appears in §954(d), which governs grant applications under §954, not under §954a.

sidy is neither aimed at children nor meant to celebrate a particular culture, the statute is facially overbroad. Cf. City of Lakewood, supra, at 766 ("[I]n a host of . . . First Amendment cases we have . . . considered on the merits facial challenges to statutes or policies that embodied discrimination based on the content or viewpoint of expression, or vested officials with open-ended discretion that threatened the same, even where it was assumed that a properly drawn law could have greatly restricted or prohibited the manner of expression or circulation at issue"). Accordingly, the Court's observation that there are a handful of permissible applications of the decency and respect proviso, even if true, is irrelevant. 15

The Government takes a different tack, arguing that overbreadth analysis is out of place in this case because the "prospect for 'chilling' expressive conduct," which forms the basis for the overbreadth doctrine, see, *e.g.*, *Massachusetts* v. *Oakes*, 491 U. S. 576, 584 (1989) (plurality opinion of O'CONNOR, J.), "is not present here." Brief for Petitioners 20–21, n. 5. But that is simply wrong. We have explained before that the prospect of a denial of government funding necessarily carries with it the potential

¹⁵The Court seemingly concedes that these isolated constitutional applications are in fact of little matter. For after speaking of specific applications that may be valid, the Court goes on to admit that these "would not alone be sufficient to sustain the statute." *Ante*, at 14. The Court nonetheless upholds the statute because it is not "persuaded that, in other applications, the language of §954(d)(1) itself will give rise to the suppression of protected expression." *Ante*, at 14. This conclusion appears to rest on some combination of (a) the Court's competition rationale as distinguishing *Rosenberger* and justifying the discrimination, (b) the Court's reading of the decency and respect proviso as something other than viewpoint based, and (c) the Court's treatment of "taking into consideration" as establishing no firm mandate subject to constitutional scrutiny. As already explained, however, fair reading of the text and attention to case law foreclose reliance on any, let alone all, of these arguments.

to "chil[1] . . . individual thought and expression." Rosenberger, 515 U.S., at 835. In the world of NEA funding, this is so because the makers or exhibitors of potentially controversial art will either trim their work to avoid anything likely to offend, or refrain from seeking NEA funding altogether. Either way, to whatever extent NEA eligibility defines a national mainstream, the proviso will tend to create a timid esthetic. And either way, the proviso's viewpoint discrimination will "chill the expressive activity of [persons] not before the court." Forsyth County, 505 U.S., at 129. See App. 22-24 (declaration of Charlotte Murphy, Executive Director of respondent NAAO) (recounting how some NAAO members have not applied for NEA grants for fear that their work would be found indecent or disrespectful, while others have applied but were "chilled in their applications and in the scope of their projects" by the decency and respect provision). Indeed, because NEA grants are often matched by funds from private donors, the constraining impact of §954(d)(1) is significantly magnified:

"[T]he chilling effect caused by [the NEA's viewpointbased selection criterial is exacerbated by the practical realities of funding in the artistic community. Plainly stated, the NEA occupies a dominant and influential role in the financial affairs of the art world in the United States. Because the NEA provides much of its support with conditions that require matching or co-funding from private sources, the NEA's funding involvement in a project necessarily has a multiplier effect in the competitive market for funding of artistic endeavors. . . . [In addition,] most non-federal funding sources regard the NEA award as an imprimatur that signifies the recipient's artistic merit and value. NEA grants lend prestige and legitimacy to projects and are therefore critical to the ability of artists and companies to attract non-federal funding sources. Grant applicants rely on the NEA well beyond the dollar value

of any particular grant." *Bella Lewitzky Dance Foundation* v. *Frohnmayer*, 754 F. Supp. 774, 783 (CD Cal. 1991) (footnote and internal quotation marks omitted). 16

Since the decency and respect proviso of §954(d)(1) is substantially overbroad and carries with it a significant power to chill artistic production and display, it should be struck down on its face.¹⁷

V

The Court does not strike down the proviso, however. Instead, it preserves the irony of a statutory mandate to deny recognition to virtually any expression capable of causing offense in any quarter as the most recent manifestation of a scheme enacted to "create and sustain . . . a climate encouraging freedom of thought, imagination, and inquiry." §951(7).

¹⁶ See also, *e.g.*, 131 Cong. Rec. 24808 (1985) ("[S]upport from the Endowmen[t] has always represented a 'Good Housekeeping Seal' of approval which has helped grantees generate non-Federal dollars for projects and productions").

¹⁷I agree with the Court that §954(d) is not unconstitutionally vague. Any chilling that results from imprecision in the drafting of standards (such as "artistic excellence and artistic merit") by which the government awards scarce grants and scholarships is an inevitable and permissible consequence of distributing prizes on the basis of criteria dealing with a subject that defies exactness. The necessary imprecision of artistic-merit-based criteria justifies tolerating a degree of vagueness that might be intolerable when applying the First Amendment to attempts to regulate political discussion. Cf. Arkansas Ed. Television Comm'n v. Forbes, 523 U. S. ___, ___ (1998) (slip op., at 13) (STEVENS, J., dissenting). My problem is not with the chilling that may naturally result from necessarily open standards; it is with the unacceptable chilling of "dangerous ideas," Speiser v. Randall, 357 U. S. 513, 519 (1958), that naturally results from explicitly viewpoint-based standards.